130-439

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 659.

ADAM BADEAU, APPELLANT,

vs.

THE UNITED STATES.

FILED AUGUST 10, 1887.

No. 749.

THE UNITED STATES, APPELLANT,

vs.

ADAM BADEAU.

FILED OCTOBER 5, 1887.

APPEALS FROM THE COURT OF CLAIMS.

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1 In the Court of Claims.

ADAM BADEAU
vs.
THE UNITED STATES. } No. 13855.

I.—*Letter of Secretary of Treasury transmitting claim under section* 1063 *of the Revised Statutes, dated June* 21, 1883.

TREASURY DEPARTMENT,
June 21, 1883.

The honorable Chief Justice and Justices of the Court of Claims:

Pursuant to section 1063 of the Revised Statutes, and in compliance with the certificate of the Second Comptroller of the Treasury, I transmit herewith the claim of Adam Badeau for pay as an officer of the United States Army, together with all the vouchers, papers, documents, and proofs pertaining thereto, that the same may be proceeded in,
2 in your honorable court, as if originally commenced therein by the voluntary action of the claimant.

Very respectfully,

CHAS. J. FOLGER,
Secretary of Treasury.

Filed June 23, 1883.

II.—*Petition.—Filed February* 19, 1884.

The petition of Adam Badeau respectfully shows:

That prior to the 18th of May, 1869, and at the said date, the claimant was a first lieutenant of the Fourth Regiment of Infantry of the United States Army, and on the said 18th of May, 1869, was, by direction of the President of the United States, retired from active service, with the rank of captain.

That on or about the 19th of May, 1869, the claimant was appointed assistant secretary of legation at London, England, and discharged the duties of that position, receiving pay therefor, until December 6, 1869.

That on the 23d of December, 1869, by order of the President of the United States, he was assigned to duty in Washington, such assignment to date from the 6th of December, 1869, and received pay as a captain in active service from the said latter date, to February 21, 1870;
3 and from that date to April 30, 1870, he received pay as a captain retired from active service.

That on the 28th of April, 1870, he was appointed consul-general at London, England, and continued as such to September 16, 1881.

That from and after the 16th of September, 1861, he received pay as a captain (mounted), retired service, until the 25th of November, 1883, when he was appointed consul-general at Havana, Cuba, in which position he still remains.

That from and after the said 18th of May, 1869, he was continuously borne upon the rolls of the Army, until in the year 1878, when he was informed his name was left off or dropped; but having furnished evidence

that he came within the exception named in the act of Congress of March 8, 1875, his name was restored to the roll of the Army on the 3d of July, 1878, and has since continued thereon.

The petitioner claims the amount of pay and allowances of a captain, mounted, retired from active service, for the period from April 28, 1870, to September 16, 1881, and from November 25, 1882, up to the present time, amounting to the sum of eighteen thousand eight hundred and fifty-two dollars and sixty-five cents. Not having received such pay or allowances during said period.

Also the additional pay and allowance provided by section 1262 of the Revised Statutes of the United States.

James G. Payne, of Washington, D. C., is authorized to appear as my attorney.

ADAM BADEAU,
Captain (retired) U. S. Army.

4 Adam Badeau, being duly sworn, says that he is the claimant herein; that no assignment or transfer of the said claim, or of any part thereof, or interest therein, has been made; that he is justly entitled to the amount herein claimed, after allowing all just credits and set-offs; that he has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided or abetted or given encouragement to rebellion against the said Government, and he believes the facts as stated in the said petition to be true.

ADAM BADEAU.

Before me.

A. DE C. CROWE,
H. B. M's Consul-Gen'l.

III.—*Traverse.*—*Filed March* 8, 1884.

And now comes the Attorney-General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed;

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the At-
5 torney-General, in pursuance of the statute in such case provided, denies the said allegations and asks judgment accordingly.

THOMAS SIMONS,
Ass't Att'y-General.

IV.—*Counter-claim.*—*Filed by defendants February* 10, 1885.

And now come the United States, by their Attorney-General, and say that Adam Badeau, the claimant in the above-entitled cause, before and at the time of the commencement of this suit was, and still is, indebted to the said defendants in a large sum of money, to wit, two thousand five hundred and sixty dollars and ten cents ($2,560.10), for money erro-

neously paid to said Badeau without authority of law, the same being on account of payments of salary made to him as an Army officer (captain, retired), from December 31, 1869, to October 31, 1882, during all of which time said Badeau was not in fact in the Army nor an officer thereof.

6 Wherefore the Attorney-General prays that judgment be entered against the claimant for the sum of two thousand five hundred and sixty dollars and ten cents ($2,560.10) aforesaid.

THOMAS SIMONS,
Ass't Att'y-General.

V.—*Replication to counter-claim.—Filed March* 9, 1885.

And now comes the claimant, Adam Badeau, and says that he is not, nor at any time was, indebted to the defendant in the sum of two thousand five hundred and sixty dollars and ten cents or any other sum, as alleged and set forth in the counter-claim of the defendants.

ADAM BADEAU.

Before me, a U. S. commissioner, southern district of New York, personally appeared Adam Badeau, the claimant above named, who, being duly sworn according to law, says that the matter and things stated in the foregoing replication are true.

[SEAL.] JOHN A. SHIELDS,
U. S. Commissioner, Southern District of New York.

7 VI.—*Special plea.—Filed by defendants, October* 30, 1885.

And now come the defendants by their Assistant Attorney-General, and not admitting, but protesting against the validity of claimant's demand and his right under the law to recover the same, or any part thereof, aver, that so much of said claim as was transmitted to this court by the Secretary of the Treasury, June 21, 1883, did not accrue within six years next preceding such transfer;

And that the increased and augmented amount demanded by claimant's petition, and not so transferred, did not accrue within the six years next preceding the filing of claimant's petition, February 19, 1884, and the same was and is forever barred by the statute of limitations. And the defendants move the court to disregard and reject so much of said claim as shall be so barred.

R. A. HOWARD,
Ass't Att'y-General.
B. WILSON,
Ass't Attorney.

8 VII.—*Interrogatories to be propounded to E. B. Washburne, a witness on part of claimant.—Filed March* 17, 1885.

First direct interrogatory. Please state your name, occupation, and place of residence.

Second direct interrogatory. State if you have any (and, if any, what) interest, direct or indirect, in the claim which is the subject of inquiry in this cause.

Third direct interrogatory. State whether you are related to the claimant; and, if so, in what degree.

Fourth direct interrogatory. Please state whether you are acquainted with the claimant, Adam Badeau. And, if so, how long have you known him?

Fifth direct interrogatory. Please state whether or not you were a member of the House of Representatives of the United States during the session of Congress of the years 1867 and 1868, and particularly
9 in the month of March, 1868.

Sixth direct interrogatory. Please state whether you had any connection with the introduction and passage by the said House of Representatives of the second section of the act entitled "An act making appropriations for the consular and diplomatic expenses of the Government for the year ending thirtieth of June, 1869, and for other purposes," approved March 30, 1868; and, if so, state what.

Seventh direct interrogatory. If you have personal knowledge of the object or intention of the enactment of the said second section of the said act, please state the same fully.

JAS. G. PAYNE,
Attorney for Claimant.

Filed March 17, 1885.

10 VIII.—*Motion of defendants to strike out certain interrogatories to be propounded to E. B. Washburne—Filed Nov. 9, 1885.*

Now come the defendants by their Attorney-General and move this honorable court to strike out the 5th, 6th, and 7th interrogatories proposed to be propounded to E. B. Washburne, a witness on part of claimant, and state as reason therefor that the said interrogatories ought not to be propounded because they are irrelevant, immaterial, incompetent, and improper.

R. A. HOWARD,
Assistant Attorney-General.
B. WILSON,
Assistant Attorney.

November, 1885.
Filed November 9, 1885.

11 IX.—*Order of the court, allowing motion of defendants to strike out certain interrogatories, with the opinion of the court.*

At a Court of Claims held in the city of Washington on the 11th day of January, A. D. 1886.

The Chief Justice read the opinion of the court, and the motion of the defendants to strike out certain interrogatories proposed to be propounded to E. B. Washburne was allowed.

OPINION.

Richardson, Ch. J., delivered the opinion of the court.

The claimant has filed written interrogatories to be propounded to Hon. E. B. Washburne, of Chicago, on the taking of his deposition as a witness

in the case. The defendants, in accordance with rule 30, have filed objections to the following:

Fifth direct interrogatory. Please state whether or not you were a member of the House of Representatives of the United States during the session of Congress of the years 1867 and 1868, and particularly in the month of March, 1868.

Sixth direct interrogatory. Please state whether you had any connection with the introduction and passage by the said House of Representatives of the second section of the act entitled "An act making appropriations for the consular and diplomatic expenses of the Government for the year ending 30th of June, 1869, and for other purposes," approved March 30, 1868; and if so, state what.

Seventh direct interrogatory. If you have personal knowledge of the object or intention of the enactment of the said second section of the said act, please state the same fully.

The object of the interrogatories is to obtain evidence of the meaning of the act of Congress referred to by the individual opinion of a member of one branch of the legislature by which it was passed, as to what was the intention of Congress in the enactment. We are not able to find in the text-books or reported decisions that such an effort was ever before made in a court of law.

It was said by Chief Justice Taney in Aldrich v. Williams (3 How., 24):

In expounding this law the judgment of the court can not in any degree be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both Houses, and the only mode in which that will is spoken is the act itself, and we must gather their intention from the language they used, comparing it when any ambiguity exists with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

This case has been often cited and approved. (United States v. Union Pacific R. R., 91 U. S., 78, and 11 C. Cls., 41.)

If the opinions of members publicly expressed at the very time when the act is under discussion, and when opportunity is given to other members to controvert them, can not be referred to for the purpose of explaining its interpretation, how much more objectionable would it be to admit the private opinions of individuals to be subsequently given in evidence for that purpose.

12 How Mr. Washburne could possibly have "personal knowledge of the object or intention of the enactment" by both houses of Congress is not easy to comprehend. At most he could have only personal knowledge of his own object and intention, and that would not go far towards showing the object and intention of each, or of a majority of the several hundred members of the House of Representatives and of the members of the Senate in passing the act, and of the President in approving it, each one of whom must be understood to have that object and that intention which the language, construed by the light of surrounding circumstances and the public history of the times, indicates.

Courts take judicial notice of some circumstances outside of an act which go to show its meaning, and in doing so they frequently take a wide range of illustration and investigation from public records, public documents, general and local history, and other matters of such general and public notoriety as may be supposed to have been in the minds of all the legislators when the act was passed, but they never admit the opinions and evidence of individual witnesses for that purpose. (The Slaughter-House Cases, 16 Wall., 37; Blake v. National Banks, 23 Wall., 317; Brown v. Piper, 91 U. S., 42.; Blake v. United States, 103 U. S., 235; Wilson v. Spalding, 19 Fed. Rep., 304; State v. New Orleans Pacific Railroad, 30 La. Ann., 980; People v. Stevens, 71 N. Y., 527; Fisher v. United States, 15 C. Cls., 323; Fendall v. United States, 16 C. Cls., 121.)

The motion of the defendants to strike out the interrogatories objected to is allowed.

Davis, J., did not sit at the hearing of this motion, and took no part in the decision.

13 X.—*Claimant allowed to amend his petition and defendants allowed to file motion to reject part of claim.*

At a Court of Claims held in the city of Washington on the 18th day of May, 1886, in the cause aforesaid, by consent of parties the claimant was allowed to amend his petition "by striking out the figures 1861, where they appear in the line 'that from and after the 16th of September, 1861', and to insert in lieu thereof the figures 1881"; and by like consent the defendants here file their motion to reject so much of claimant's demand set up by his petition as was not transmitted to this court by the Secretary of Treasury.

JAMES G. PAYNE,
Att'y for Claimant.
B. WILSON,
Att'y for Defendants.

14 XI.—*Findings of fact and conclusions of law.—Filed by the court May 9, 1887.*

This case having been heard before the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

On the 21st April, 1869, the claimant, then being a first lieutenant of infantry in the Army of the United States, unassigned, was appointed by the President assistant secretary of legation at London. On the 19th May, 1869, he accepted the appointment, filed in the Department of State his oath of office, and embarked for his post, reaching England May 31st, 1869.

II.

On the 15th May, 1869, a military board was convened by the following order:

[Special Orders No. 116.—Extract.]

HEADQUARTERS OF THE ARMY,
ASSISTANT-GEN'L'S OFFICE,
Washington, May 15, 1869.

12. By direction of the President, a board of officers will as-
15 semble in New York City at 12 m. on the 18th inst., or as soon thereafter as practicable, for the examination of Bvt. Brig. General Adam Badeau, 1st lieutenant U. S. Army, for retirement, in pursuance of the act of Congress of the 3d of August, 1861. * * *

Upon completion of the examination of General Badeau the president of the board will dissolve the board and order the officers composing the same to resume their proper duties.

* * * * * * *

By command of Gen'l Sherman.

E. D. TOWNSEND,
Adjutant-General.

The board met in New York on the 18th May, 1869, and the following proceedings took place:

NEW YORK, *May* 18th, 12 m.

The board met pursuant to above order. Owing to the illness and consequent absence of Gen'l Reeve the board adjourned.

NEW YORK, *May* 18th, 4 p. m.

The following telegram was received:

WASHINGTON, D. C., *May* 18th.

General MCDOWELL,
New York City:

16 By direction of the Secretary of War, General Rufus Ingalls is detailed as a member of the retiring board, vice Reeves.

Acknowledge receipt.

E. D. TOWNSEND,
Adjutant General.

On receipt of the above telegraphic order the board reconvened.

Present all the members and the recorder.

The board proceeded to consider the case of 1st Lieut. Adam Badeau, bvt. brig. gen'l U. S. A., who appeared before the board, and having heard the orders convening it read, was asked if he objected to any member named in the orders. He having no objection, the board was duly sworn in his presence by the recorder, and the recorder by the president. * * * The board was cleared, and after mature deliberation find

"that 1st. Lieutenant Adam Badeau, U. S. Infantry, bvt. brig. general U. S. A., isincapacitated for active service, and that said incapacity is due to a wound received in the foot whilst on duty as captain and additional aide-de-camp to Maj. Gen'l T. W. Sherman in the assault on Port Hudson in May, 1863."

IRWIN MCDOWELL,
Brt. Maj. Gen'l., Pres'd't Board.

H. STOCKTON,
1st Lieut. Ord., Brt. Capt., A. D. C., Recorder of Board.

17 On the 22d May, 1869, this was approved by the Secretary of War, and on the 25th May the President made the following order:

[Special Orders, No. 126—Extract.]

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, May 25, 1869.

* * * * * * *

12. Brevet Brigadier-General Adam Badeau, 1st lieutenant U. S. Army, having, at his own request, been ordered before a board of examination, and having been found "incapacitated for active service, and that said incapacity is due to a wound received in the foot whilst on duty as captain and additional aide-de-camp to Brigadier-General T. W. Sherman in the assault on Port Hudson in May, 1863," the President directs that his name be placed upon the list of retired officers of that class in which the disability results from long and faithful service, or from some injury incident thereto, in accordance with sections 16 and 17 of the act approved August 3, 1861. In accordance with section 32 of the act approved July 28, 1866, General Badeau is, by direction of the President, retired
18 with the full rank of captain, to date from May 18, 1869.

* * * * * * *

By command of General Sherman.

E. D. TOWNSEND,
Adjutant-General.

III.

The claimant held the office of assistant secretary of legation, and received the salary thereof, until the 6th December, 1869, when he resigned. By order of the President, December 23, 1869, he was "assigned to duty in the city of Washington" as an officer of the Army, it being stated that the order was to date from December 6, 1869. He drew from the pay department of the Army the pay of an active captain for the period from December 6, 1869, to February 21, 1870, and the pay of a retired captain from February 21, 1870, to April 30, 1870, the pay so drawn amounting to $621.84. He was appointed consul-general at London, England, April 28, 1870, and was in the consular service of the Government until the commencement of this suit, except for a period of about fourteen months, beginning in September, 1881, and ending in November, 1882.

19

IV.

From May, 1869, until May, 1878, the claimant was borne upon the retired list of the Army as having been retired with the rank of captain on the 18th May, 1869. On the 7th May, 1870, the following order was issued:

[General Orders, No. 20.]

HEADQUARTERS OF THE ARMY,
ADJUTANT-GENERAL'S OFFICE,
Washington, May 7, 1878.

The following are announced:

Dropped.

* * * * * * *

In conformity with section 1223 Revised Statutes and opinion of Attorney-General dated December 11, 1877. (1) Captain Adam Badeau, U. S. Army, retired, to date from May 19, 1869.

* * * * * *

By command of General Sherman.

E. D. TOWNSEND,
Adjutant-General.

The claimant thereupon applied to have the above order revoked upon the ground that he was disabled within the intent of the act 3d
20 March, 1875, and he produced and filed the following certificate:

BANGOR, MAINE, *Feb.* 20, 1878.

I, Eugene F. Sanger, physician and surgeon, certify that I was medical director of the 2d division, 19th Army Corps, before Port Hudson, May 27, 1863, and that Captain Adam Badeau, A. D. C. on Brig. Gen'l T. W. Sherman's staff, received a bullet wound penetrating the instep of the left foot, and making its exit below the internal malleolus. I resected the 2d cuniform bone, parts of the 1st and 3d cuniform, and the proximal end of the 2d metatarsal bone, on acc't of which resection he was sent to the rear at New Orleans.

Respectfully, your ob't servant,

EUGENE F. SANGER,
Brevet Lt. Col. and late Brigade Surgeon, late Medical Director, 19th Army Corps, now Examining Surgeon Pension Bureau.

The foregoing surgeon's certificate was duly referred to the Surgeon-General of the Army. The order of reference and the Surgeon-General's report thereon were as follows:

21 WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, March 4, 1878.

Respectfully referred to the Surgeon-General, U. S. Army, for his opinion as to whether the disability of Captain Badeau, for which he was

retired, can be regarded as bringing him within that class of officers specified in the proviso of section 2, act of March 3, 1875 (G. O. 16 of 1875), who have "an arm or leg permanently disabled by reason of resection on account of wounds."

The proceedings of the Retiring Board in Captain Badeau's case and other papers are enclosed herewith.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

SURGEON-GENERAL'S OFFICE,
March 6, 1878.

Respectfully returned to the Adjutant-General of the Army with opinion that the evidence submitted is sufficient to establish that Captain Badeau's case comes properly within that class of officers specified by
22 section 2, act of March 3, 1875, as one in which an arm or leg is permanently disabled by reason of resection on account of wounds.

J. W. BARNES,
Surgeon-General.

Whereupon the Secretary of War, on the 3d July, 1878, made the following order, under which the claimant was borne on the retired list of the Army up to the time of his bringing this action.

WAR DEPARTMENT, *July* 3, 1878.

Respectfully returned to the Adjutant-General of the Army.

The former decision in Capt. Badeau's case was correct, as the record then stood, but it now appearing that his case comes clearly within the provisions of the proviso to section 2, act of March 3, 1875, his name will be restored to the retired list.

GEORGE W. MCCRARY,
Secretary of War.

V.

From the 18th May, 1869, to the 6th December, 1869, the claimant received no pay as a military officer, nor has he received mil-
23 itary pay at any time while holding a diplomatic or consular office.

From the 6th December, 1869, to the 21st February, 1870, while assigned to duty in the city of Washington as a retired officer under the act 21st January, 1870 (16 Stat. L., p. 22), the claimant was paid as a captain in active service the sum of $396.92, during which period he was rendering service as an officer.

From the 21st February, 1870, to the 31st October, 1882, the claimant was paid as an officer on the retired list for periods when he was not holding a diplomatic or consular office the sum of $2,163.18.

There has been withheld from the claimant while not holding a diplomatic or consular office his pay as a retired officer from November 1, 1882, to November 25, 1882, amounting to $.

There has been withheld from the claimant while holding a diplomatic

or consular office between the 19th May, 1869, and the 19th February, 1884, when this action was brought, his pay as a retired officer, amounting to the sum of $

VI.

24 The claimant was beyond the seas at the times when the foregoing claims accrued, and his petition was filed in this court within three years after the disability had ceased.

CONCLUSIONS OF LAW.

The court being equally divided upon the foregoing findings as to the claimant's right to recover does, for the purposes of an appeal, frame the following conclusions of law:

The petition of the claimant and the counter-claim of the defendants should both be dismissed.

(Davis, J., was absent when this case was tried and took no part in the decision.)

NOTE BY THE CLERK.—The court did not file an opinion in this case.

25 XII.—*Judgment of the court.*

ADAM BADEAU
vs.
THE UNITED STATES. } 13855.

At a Court of Claims, held in the city of Washington, on the 9th day of May, A. D. 1887, judgment was ordered to be entered as follows:

The court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimant, Adam Badeau, be dismissed; and it is further ordered that the counter-claim of the defendants be dismissed.

26 XIII.—*Application of claimant for and allowance of appeal.*

ADAM BADEAU
vs.
THE UNITED STATES. } 13855.

Now comes the claimant, by his attorney of record, James G. Payne, and prays an appeal to the Supreme Court of the United States from the judgment rendered in this cause on the 9th day of May, 1887.

JAMES G. PAYNE.

Filed July 14, 1887.

AT CHAMBERS.

Allowed in vacation, July 14, 1887.

WILLIAM A. RICHARDSON,
Chief-Justice.

27 In the Court of Claims.

ADAM BADEAU
vs.
THE UNITED STATES. } 13855.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the judgment of the court, dismissing the petition and the counter-claim, of the application of claimant for and the allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, this 30 day of July, 1887.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Ct. of Claims.

28 In the Court of Claims—term 1886–1887.

ADAM BADEAU
vs.
THE UNITED STATES. } No. 13855.

From so much of the judgment rendered in the above-entitled cause on the 9th day of May, 1887, as dismisses the counter-claim of defendants, the defendants, by their Attorney-General, on the first day of August, 1887, make application for and give notice of an appeal to the Supreme Court of the United States.

ROBERT A. HOWARD,
Assistant Attorney-General.

Filed Aug. 1, 1887.

Filed and allowed in vacation August 1st, 1887.

WILLIAM A. RICHARDSON,
Chief-Justice.

A true copy of record: In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this fifth day of October, A. D. 1887.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk Court of Claims.

29 Supreme Court of the United States.

ADAM BADEAU, PLAINTIFF IN ERROR,
against
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. }

It is hereby consented and stipulated by and between the parties to this action that the record now on file in this court, being the return of the clerk of the Court of Claims upon an appeal herein, be corrected and

amended by inserting therein, and adding thereto, and making a part thereof the papers hereto annexed, as follows: Conclusions and order of the Court of Claims marked No. 1 (A and B), and that upon filing this stipulation with the clerk of the United States Supreme Court, the record shall be deemed amended by the insertion of the papers hereto annexed and herein above recited, and that the plaintiff in error may enter any and all necessary orders to carry this stipulation into effect.

Dated October 5, 1888.

ROBERT A. HOWARD,
Asst. Atty. Gen.
JAS. G. PAYNE,
Attorney for Claimant.

30 (No. 1—A.)

Court of Claims. No. 13855.

ADAM BADEAU
v.
THE UNITED STATES.

CONCLUSIONS AND ORDER.

Nott, J., announced the following as the conclusions and order of the court:

(1) When the act of 1875 was passed the act of 1868 had been construed by the President to extend only to officers on the active list. The purpose, therefore, of the act of 1875 was to change the law as construed and administered by the Executive so that it should apply, with certain exceptions therein named, to officers on the retired list.

(2) It is within the power of Congress to validate the defective title of an officer to an office; and it is not to be supposed that Congress intended to divide the retired list into two parts and withhold the benefit of the exceptions from one of them. The act of 1875, therefore, must be held to extend to all of the officers who were then on the retired list by Executive authority, and to constitute the law governing the rights and disabilities of retired officers in regard to the holding of diplomatic and consular offices.

(3) After the act of 1875 became the law, it was within the official power and duty of the President to ascertain whether any officer accepting or holding a diplomatic or consular office came within the exceptions of the statute. If the President ascertained this fact and determined in a legal and proper manner adversely to the officer, it would be tantamount to determining that he had resigned his commission and to an acceptance of such a resignation, and under the decision of this court in Miller's Case (19 C. Cls., R. 338) it would be beyond the power of the President to reinstate the officer by the revocation of the order of his dismissal. Conversely, if the order of the President was not warranted by law, then under the decisions in the Naval Cadet Cases (20 C. Cls. R., 438; 116 U. S., 483) the officer's official connection with the Army was not severed, and it was proper for the President to restore him to the retired list.

(4) In this case the findings of fact framed and requested by the parties, if all requested by both parties should be allowed in extenso, would be insufficient to present the vital question in the case intelligibly to the consideration of the Supreme Court. The findings requested by the defendants do not set forth the order of dismissal, and the findings requested by the claimant do not set forth the order of restoration. The arguments, moreover, though prolonged, did not discuss the question whether the President's order was within the intent and authority of the statute, and whether it in legal effect severed the claimant's connection with the Army.

The case is therefore remanded to the trial docket for further
31 proceedings and hearing upon the question indicated, and for evidence as to what appointments and promotions took place upon the retired list subsequent and consequent to striking off the name of General Badeau, December 13, 1877, and whether and when the retired list reached the maximum allowed by law between December 13, 1877, and June 18, 1878.

Davis and Weldon, J. J., did not sit in this case, and took no part in the decision.

32 No. 1.—B.

In the Court of Claims. No. 13855.

ADAM BADEAU
vs.
THE UNITED STATES.

Evidence for claimant.

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JAMES G. PAYNE,
Attorney of Record.

Now comes the claimant, and, by his attorney, moves the court to request that the Department of War furnish a statement of the records from the said Department, showing what, if any, appointments and promotions took place upon the retired list of the Army subsequent to and
33 in consequence of the striking off of the name of Adam Badeau, December 13th, 1877.

Also, whether and when the retired list reached the maximum allowed by law between December 13th, 1877, and June 18th, 1878.

JAMES G. PAYNE,
Attorney for Claimant.
By JAMES H. TAYLOR.

(3942—A.)

WAR DEPARTMENT,
Washington City, September 9th, 1886.

To the Clerk Court of Claims:

SIR: I have the honor to transmit herewith a certified statement, prepared by the Adjutant-General, in response to the request of the Court of Claims of August 24, 1886, for certain information for use in the claim of Adam Badeau, No. 13855.

Very respectfully,

S. C. DRUM,
Acting Secretary of War.

(Enc. 3 of 3942—A.)

UNITED STATES OF AMERICA:

WAR DEPARTMENT,
Washington City, August 27, 1886.

Pursuant to section 882 of the Revised Statutes, I hereby cer-
34 tify that it appears from the records of the Adjutant-General's Office, War Department, that no appointments nor promotions took place upon the retired list of the Army subsequent to and in consequence of the striking off of the name of Adam Badeau therefrom, December 13, 1877, and that the number of officers on the retired list did not reach the maximum allowed by law at any time between December 13, 1877, and June 18, 1878.

J. C. KELTON,
Acting Adjutant-General.

Be it known that J. C. Kelton, who signed the foregoing certificate, is the Acting Adjutant-General of the Army, and that to his attestation as such full faith and credit are and ought to be given.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed, on this ninth day of September, one thousand eight hundred and eighty-six.

[SEAL.]

S. C. DRUM,
Acting Secretary of War.

BANGOR, ME., *Feb.* 21, 1878.

DEAR GENERAL: Have this day mailed letters, or more properly, certificates to Adj. Gen'l and Surg. Gen'l, which I hope will be satisfactory.

I must apologize for my neglect, but I have been pressed with business and not very well.

I omitted two words in the Adj. Gen'l's certificate, but not in the Surg. Gen'l's, viz, "permanently disabled."

Yours, &c.,

E. F. SANGER.

35 (Endorsed on back.) 6933–3. War Dept. 1878. 909 A. C. P., 1878. 955 S. G. O., 1878.

CONSULATE-GENERAL OF THE UNITED STATES
FOR GREAT BRITAIN AND IRELAND,
London, January 26, 1878.

Mr. Adjutant-General of the Army:

SIR: Referring to my previous communication of December 31st ult., I have now the honor to transmit the certificate of Dr. John Way, M. D., member of the Royal College of Surgeons, London, made after examination of my wounds. This will be forwarded by me to Dr. Eugene Sanger, M. D., late surgeon of U. S. volunteers, and now pension examining surgeon at Bangor, Maine, by whom the operation of resection was performed upon me, on the 27th of May, 1863; and his certificate of that fact will be appended or enclosed herewith.

I have, therefore, the honor to request that, as the proof of resection will then be complete, the order of the Secretary of War for the removal of my name from the Army Register may be revoked.

I am sir, very respectfully, your obedient servant,

ADAM BADEAU,
Captain (retired) U. S. Army, Brvt. Brig. Gen'l.

Still I trust.

36 (First endorsement, L. B., 23-560.)

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, March 4, 1878.

Respectfully referred to the Surgeon-General U. S. Army for his opinion as to whether the disability of Captain Badeau, for which he was retired, can be regarded as bringing him within that class of officers specified in the proviso of section 2, act of March 3, 1875 [G. O. 16 of 1875], who have "an arm or leg permanently disabled by reason of resection on account of wounds."

The proceedings of the retiring board in Captain Badeau's case, and other papers, are enclosed herewith.

By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

Enclosing 236 A. C. P., 1878; 872 A. C. P., 1878; 239 R. A. G. O., '69. H. S. B.

(Second endorsement.)

SURGEON-GENERAL'S OFFICE,
March 6, 1878.

Respectfully returned to the Adjutant-General of the Army with opinion that the evidence submitted is sufficient to establish that Captain Badeau's case comes properly within that class of officers specified by section 2, act of March 3, 1875, as one in which an arm or leg is permanently disabled by reason of resection on account of wounds.

J. W. BARNES.
Surgeon-General.

37 (Third endorsement.)

ADJUTANT-GENERAL'S OFFICE,
March 8, 1878.

Respectfully submitted to the Secretary of War. It was stated to the Attorney-General, when the case of Captain Badeau was laid before him, that that officer did not belong to either class of retired officers named in the proviso of section 2, act of March 3, 1875. In case it shall be decided that Captain Badeau has a "*a* leg permanently disabled by reason of resection on account of wounds," his case will stand precisely like that of General Sickles in respect to the question of retaining his name on the list of retired officers of the Army under the act of March 3, 1875. A statement of his case is enclosed. There was no record of the character of his wound previous to the Attorney-General's opinion.

E. D. TOWNSEND,
Adjutant-General.

Enclosing 236 A. C. P., '78; 872 A. C. P., '78; 239 R. A. G. O., '69. H. S. B.

For decision of Sec'y of War see endorsement on enclosure No. 1, War Dept.

Rec'd back A. G. O., July 6, 1878. Decision of the Secretary of War endorsed on 236 A. C. P., '78.

909–A. C. P., 1878. 19. 6933. War Department—Received July 3, 1878. 955, S. G. O., 1878.

LONDON, *Jan.* 26, '78.

38 Badeau, Adam, transmits certificate to be forwarded by the surg. who performed the operation of resection upon him, from which the surg. certifies that he is permanently disabled, and requests that the order of the Sec'y of War for the removal of his name from the Army Register may be revoked.

File with 362 A. C. P., '76.

NOTE.—The certificate (of present condition), said to be transmitted is not herewith, but entered as 872 A. C. P., '78. (Herewith one en. 15 ens., and 123 G. C., 285 E. B., 19, 1869; G. C. 266, E. B. 19, 1869.) Rec'd back, A. G. O., March 7, '78. Rec'd, A. G. O., Feb. 26, '78. 2613, 3–34.

BANGOR, MAINE, *Feb.* 20, 1878.

I, Eugene F. Sanger, physician and surgeon, certify that I was medical director of the 2d division, 19th Army Corps, before Port Hudson, May 27, 1863, and that Captain Adam Badeau, A. D. C. on Brig. Gen'l T. W. Sherman's staff, received a bullet wound penetrating the instep of the left foot, and making its exit below the internal malleolus. I resected the 2d cuneform bone, parts of the 1st and 3d cuneform and the proximal end of the 2nd metatarsal bone, on acc't of which resection he was sent to the rear at New Orleans.

Respectfully, your ob't servant,

EUGENE F. SANGER,
Brevet Lt. Col. and late Brigade Surgeon,
late Medical Director 19th Army Corps,
now Examining Surgeon Pension Bureau.

39 STATE OF MAINE,
County of Penobscot:

Subscribed and sworn to before me on this twenty-first day of February 1878.

[SEAL.] NATHAN L. PERKINS,
Recorder of the Police Court in the City of Bangor.

Rec'd, A. G. O., Feb. 23, '78.

872–A. C. P., 1878. 6933–2 War Dept., 1878. 362, '76. 955, A. G. O., 1878. File with 362, A. C. P., '76. Sanger, Eugene F., late med. dir. 19th A. C.

BANGOR, MAINE, *Feb.* 20, '78.

Sworn certificate that while he was med. dir. 2d div. 19th A. C., before Port Hudson, May 27, 1863, Capt. Adam Badeau, A. D. C. on Brig. Gen'l T. W. Sherman's staff, received a bullet wound penetrating the instep of the left foot, and making its exit below the internal malleolus; that he resected the 2d cuneform bone, parts of the 1st and 3d cuneform, and the proximal end of the 2nd metatarsal bone, on account of which resection he was sent to the rear at New Orleans.

(See 909, A. C. P., 1878.) Rec. A. G. O., Feb. 23, 1878. 13855, No. 20. Filed June 23, 1883. J. R.

It is understood that Capt. Badeau's name is to be omitted from the 1878 register pending receipt of and action on the evidence he proposes to submit.

Jan. 29, 1878.

Yes. E. D. T.

40 CONSULATE-GENERAL OF THE UNITED
FOR GREAT BRITAIN AND IRELAND,
London, December 31, 1877.

To the Adjutant-General of the Army:

SIR: I have the honor to acknowledge the receipt of your communication of the 13th December inst., informing me that the question of my status on the Army Register having been by the Secretary of War placed before the Attorney-General for opinion, the Attorney-General replied that "Captain Badeau has ceased to be a retired officer of the Army by the statuatory provisions embodied in section 1223, Revised Statutes," and "his name can not therefore be now legally continued on the retired list," and that this view of the Attorney-General having been concur'ed in by the Secretary of War, my name will henceforth be omitted from the Army Register.

In reference to his decision I beg to say that by the opinion of the Attorney-General, of June 11, 1877, published in General Orders, No. 57, H'dq'rs of the Army, June 22, 1877, it is expressly stated that there is an exception to section 1223, above alluded to, "made by the act of March 3, 1875, which provides that a certain class of officers therein described who 'are borne upon the retired list shall be continued thereon, notwith-

standing the provisions of section 2, chapter 38, act of March 30, 1868,' which is embodied in section 1223 of the Revised Statutes." "Of course," says the Attorney-General, "the officers therein described, even if accepting an appointment in the consular or diplomatic service, would not vacate their commission."

41 The words of the act of March 3, 1875, referred to by the Attorney-General are these: "Provided that no part of the foregoing act shall apply * * to those retired officers who have lost an arm, or leg, or have an arm or leg permanently disabled by reason of resection, or on account of wounds, or both eyes, by reason of wounds received in battle."

Those words exactly cover my case, and brings me within the exception, as I am a retired officer with a leg permanently disabled by reason of resection on account of wounds received in battle. The evidence of my retirement is on file in the records of the War Department, Special Order No. 126, H'dq'rs of the Army, May 25, 1869, in which it is stated that I had been ordered before a board of examiners, and found "incapacitated for active service, and that said incapacity is due to a wound received in the foot while on duty * * * in the assault on Port Hudson, in May, 1863."

On account of this wound three of the metatarsal bones of my left foot were removed; and according to Webster's Dictionary, resection is defined as the act of cutting or paring off.

I have applied to the surgeon who performed the operation on the battlefield for a certificate of the resection, and as soon as this is received it will be submitted to the War Department, to be laid, if necessary, before the Attorney-General, where I take it for granted that the presentation of these facts will induce a reversal of the opinion and order you have communicated.

In consequence, however, of my absence from the country on public service, and of the fact that the surgeon is no longer in the U. S.

42 service, there may be some delay in hearing from him. I therefore respectfully request that the order of the Secretary may be suspended until the surgeon's reply to my communication is received. In the mean time, in order to keep my record correct, I shall continue to forward my monthly reports as an Army officer, and trust I shall not be deemed as trespassing if I now sign myself,

Very respectfully, your obedient servant,

ADAM BADEAU,
Captain (retired) U. S. Army, Brvt. Brig. Genl.

231. A. C. P. 1878. 6933–1. War Department. File with 362' A. C. P., '76. 955. S. G. O., 1878.

LONDON, ENGLAND, *Dec.* 31, 1877.

Badeau, Adam, captain, U. S. A. (retired). In reply to letter from A. G. O., of 13th instant, states that under opinion of the Attorney-General of June 11, '77, he belongs to a class of officers that do not vacate their commissions by accepting appointment in the consular or diplomatic service, as he is a retired officer, with a leg permanently disabled by reason of resection on account of wounds received in battle.

Requests that the order directing the omission of his name from the Army Register be suspended until he can furnish report of the surgeon who performed the operation.

Received, A. G. O., January 15, '78.

Jan. 22, '78, answered.

July 11, '78.

See letter to Capt. Badeau. Copy to Paym'r Gen'l.

43 WAR DEPARTMENT,
July 3, 1878.

Respectfully returned to the Adjutant-General of the Army.

The former decision in Capt. Badeau's case was correct as the record then stood, but it now appearing that his case comes clearly within the provisions of the proviso to section 2, act of March 3, 1875, his name will be restored to the retired list.

GEORGE W. MCCRARY,
Secretary of War.

Wo.
July 3, 1878.

Take necessary action restoring Capt. Badeau to retired list.

S. C. D.

LETTER TO BADEAU.

July 11, '78.

Restoration announced in G. O. of '78, revoking G. O. No. 20.

2613. 3–40.

(13855. No. 13. Filed June 23, 1883. J. R.)

44 (236. A. C. P., 1878.)

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Jan. 19, 1878.

Acknowledge receipt and say the Secretary will consider his case when he furnishes the certificate to which he alludes in his com'n.

E. D. T.

(Letter Jan. 22, 1878.)

March 2*d.*

Shall this be ref'd to the surgeon gen'l for an opinion whether the disability of Capt. B. brings him within the law ref'd to.

Do so, Gen'l T. says.

E. D. T.

909. A. C. P., '78. To Surg. Gen'l with 236, A. C. P., '78. 872, A. C. P., '78. 239, A. G. O., '69, and app'd. R. Back.

Papers sent A. G. M'ch 8, '78, to submit to the Sec. of War. 2613. 3–40.

45 (Indorsed:) Supreme Court, U. S., 188 , October term. No. 659 and 749. Adam Badeau, app't, vs. The United States and The U. S. vs. Badeau. Stipulation and addition to record. Office Supreme Court, U. S. Filed Oct. 5, 1888. James H. McKenney, clerk.

(Indorsement on cover:) No. 659. Adam Badeau, appellant, vs. The United States. Filed August 10, 1887. No. 749. The United States, appellant, vs. Adam Badeau. Filed October 5, 1887. Court of Claims.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 659

ADAM BADEAU, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

And now comes Daniel P. Hays, attorney for the plaintiff in error in No. 659 and moves to advance the above mentioned case for the following reasons:

The plaintiff in error, Adam Badeau, prior to May 18th, 1869, and at the said date was a First Lieutenant of the Fourth Regiment of Infantry of the United States Army, and on the said 18th day of May, 1869, was, by direction of the President of the United States, retired from active service with the rank of Captain.

On or about May 19th, 1869, he was appointed Assistant Secretary of Legation at London, England, and discharged the duties of that position, receiving pay therefor until December 6th, 1869.

On the 23d day of December, 1869, by order of the President of the United States, he was assigned to duty in Washington, such assignment to date from December 6th, 1869, and received pay as Captain in active service from the said latter date to February 21st, 1870, and from that date to April 20th, 1870, he received pay as a Captain retired from active service.

On the 28th of April, 1870, he was appointed Consul-General at London, England, and continued as such to September 16, 1881.

From and after the 16th of September, 1881, he received pay as a Captian (mounted), retired service, until the 25th of November, 1882, when he was appointed Consul, General at Havana, Cuba, in which position he remained until April, 1884.

From and after the said 18th of May, 1869, he was continuously borne upon the rolls of the Army, until in the year 1878, when he was informed his name was left off or dropped; but having furnished evidence that he came within the exception named in the Act of Congress of March 8, 1875, his name was restored to the roll of the Army on the 3d of July, 1878, and has since continued thereon.

He claims the amount of pay and allowances of a Captain, mounted, retired from active service, for the period, from April 28, 1870, to September 16, 1881, and from November 25, 1882, up to the present time, not having received such pay or allowances during said period. The amount stated in his petition was eighteen thousand eight hundred and fifty-two dollars and sixty-five cents.

He also claims the additional pay and allowance provided by section 1262 of the Revised Statutes of the United States.

Payment of his claim has been refused by the Treasury Department upon the ground that by the acceptance of the office of Assistant Secretary of Legation at London, England on May 19, 1869, he ceased to be an officer of the Army under the provisions of section 1223 of the Revised Statutes.

The Secretary of War, to whom the matter was referred, reported as follows: "Captain Badeau is considered by this Department as properly borne on the retired list of the Army."

The Treasury Department, in a letter recommending that the claims be transmitted, with all vouchers, papers, documents and proofs to the Court of Claims of the

United States for trial and adjudication, certified as follows:

"In view of their great importance and the serious "questions which they present, I have the honor herewith "to forward the said claims, with all the vouchers, pa- "pers, documents, and proofs pertaining thereto, and "to recommend that said claims be transmitted, with "said vouchers, papers, documents, and proofs, to "the Court of Claims of the United States for trial "and adjudication, to be there proceeded in as au- "thorized and directed in section 1063 of the Revised "Statutes. And I do hereby further certify that each of "said claims involves disputed facts and controverted "questions of law; that said claims really constitute but "one claim; and that the amount in controversy exceeds "three thousand dollars; and that the decision of either "claim will affect a class of cases and furnish a precedent "for the future action of the Treasury Department in the "adjustment of a class of cases.

"Very respectfully,

"W. W. UPTON,

"*Comptroller.*"

The decision of this case further involves the question as to the status of the plaintiff in error, in the Army, he being now borne upon the retired list of the Army and recognized by the War Department, but being refused pay as an Army officer by the Treasury Department upon the ground that he has ceased to be an officer of the Army by his acceptance of a diplomatic position.

At the first hearing before the Court of Claims, an opinion was rendered by Mr. Justice Nott, which was in favor of the claimant upon the main points involved in the case, but as the Court required evidence as to what appointments and promotions took place upon the retired list subsequent and consequent to striking off the name of General Badeau, December 13th, 1877, and whether and when the retired list reached the maximum allowed by law between December 13th, 1877, and June 18th, 1878, it remanded the case to the trial docket for further proceedings and hearing.

Upon the second argument the Court made its findings of fact, but being equally divided upon the claimant's right to recover, dismissed the petition of the claimant and the counterclaim of the defendant. The questions involved therefore, in this appeal, have not yet been decided.

No opposition is offered by the Attorney-General to this motion.

DAN'L P. HAYS,
Attorney for Plaintiff in error.

IN THE

Supreme Court of the United States.

No. 659.

ADAM BADEAU,

Appellant,

vs.

THE UNITED STATES.

No. 749.

THE UNITED STATES,

Appellant,

vs.

ADAM BADEAU.

BRIEF FOR APPELLANT, ADAM BADEAU.

DANIEL F. HAYS,
Of Counsel for ADAM BADEAU,
Appellant.

EVENING POST JOB PRINT, New York.

In the Supreme Court of the United States.

ADAM BADEAU, Appellant, vs. THE UNITED STATES.	No. 659.
THE UNITED STATES, Appellant, vs. ADAM BADEAU.	No. 749.

This cause comes before this Court by appeals from the judgment of the Court of Claims, rendered on the 9th day of May, 1887, dismissing the petition of Adam Badeau and the counterclaim of the United States.

Adam Badeau, prior to the 18th day of May, 1869, and at said date, was a first lieutenant of the Fourth Regiment of Infantry of the United States Army. On the 18th day of May, 1869, pursuant to the provisions of law and by order of the President, his name was placed upon the

list of retired officers of that class, in which the disability results from long and faithful service, or from some injury incident thereto, in accordance with sections 16 and 17 of the act approved August 3, 1861 (sections 1245, *et seq.*, Revised Statutes). (See Record, page 8.)

On the 19th of May, 1869, he accepted an appointment as Assistant Secretary of Legation at London (Record, folio 14), which office he held until December 6, 1869, when he resigned (folio 18).

By order of the President, December 23d, 1869, he was assigned to duty in the City of Washington "as an officer of the army," it being stated that the order was to date from December 6th, 1869 (Record, folio 18).

He served under such assignment until February 21st, 1870, and received the pay of an "active captain" for that period (Record, folio 18) from the pay department of the army.

From February 21st, 1870, to April 30th, 1870, he was recognized as a retired officer by the War Department, and received his pay as such officer (Record, folio 18).

On April 28th, 1870, he was appointed Consul-General to London, and held that position until September, 1881.

From September, 1881, to November, 1882, he was recognized by the War Department as an officer on the retired list, and received from the pay department of the army pay as such officer (Record, p. 10, folio 23).

He was in the consular service from April 28th, 1870, until the commencement of this suit, except for a period of about fourteen months commencing in September, 1881, and ending in November, 1882 (folio 18).

During the period when the appellant, Adam Badeau, has been holding a diplomatic or consular position, he has drawn no pay as a retired officer of the army (folio 23).

He brought this suit to recover the pay due him as a retired officer during the periods from April 28th, 1870, to September 16th, 1881, and from November, 1882, to the time of the filing of his petition, and also for the longevity pay provided for by section 1262 of the Revised Statutes.

On May 7th, 1878, his name was dropped from the army

register of that year, by order appearing on page 9 of the record, it being supposed at the time by the War Department, that he did not come within the exception provided and contained in the Act of March 3d, 1875, sec. 2 (18 Statutes, p. 512, ch. 178) as follows:

"Every officer now borne upon the retired list, who has "lost an arm or leg, or has an arm or leg permanently "disabled by reason of resection on account of wounds, "shall be continued thereon, notwithstanding the pro- "visions of section 2, chapter 38, Act of March 30th, 1868, "and all acts or parts of acts inconsistent herewith are "hereby repealed."

The Act of March 30, 1868, provided as follows (section 1223 Rev. Stat.):

"Any officer of the army who accepts or holds any appointment in the diplomatic or consular service of the Government, shall be considered as having resigned his place in the army, and it shall be filled as a vacancy."

The appellant immediately applied to have his name restored to the retired list upon the ground that he came within the exception provided in the Act of March 3d, 1875, above quoted, and upon furnishing the evidence shown on page 9 of the record, his name was on the 3d day of July, 1878, restored to the Retired List (p. 10 of Record).

Since that date his name has been continuously borne upon the retired list in the Army Register, and he has been treated by the War Department as an officer of the army on the retired list.

The Court of Claims having found the facts as above stated, and being unable to agree upon the law governing the appellant's right to recover his pay as a retired officer, dismissed his petition, and also the counterclaim of the Government for moneys paid to him after his acceptance of the position of Assistant Secretary of Legation at London.

Appeals are taken by each party from this judgment.

The questions involved in these appeals are as follows:

FIRST.—What construction is to be given to the act of March 30, 1868, and under this: (*a.*) Was it intended to and did it apply to officers on the retired list? (*b.*) If it applied to the retired list, did the acceptance by the appellant, Adam Badeau, of the position of Assistant Secretary of Legation at London *ipso facto* remove him from the army, or was it necessary for the Government to accept his resignation, or do some formal act showing that it regarded him as out of the army?

SECOND.—What effect did the Act of March 30, 1875, have upon the appellant, Badeau, he being at the time of its approval, borne on the retired list of the army

THIRD.—If properly on the retired list of the U. S. Army is he not entitled to pay as a retired army officer, while he held a diplomatic or consular position?

First.

What construction is to be given to the Act of March 30th, 1868?

(*a.*) Did it apply to officers on the retired list?

The rules to be applied to the construction and interpretation of statutes are too well settled to require extended comment before this court.

The difficulty in this, as in other cases, lies in the application of the rules.

Attention is therefore called to the following principles, the application of which will enable the Court in this case to determine the meaning of the statute in question.

FIRST.—What was the intention of the statute, for that shall prevail even as against its letter.

Bacon's Abr., tit. Statute, 1.
Potter's Dwarris on Stat., pp. 175, 178.
Smythe *v.* Fiske, 23 Wall., 380.
U. S. *v.* Freeman, 3 How., 565.

The best rule of interpretation to be adopted by the courts is to ascertain the meaning of the Legislature from the words used in a statute, and the subject-matter to which it relates, and to restrain its operation *within narrower limits than its words import* if satisfied that the literal meaning would extend it to cases which the Legislature never designed to include.

Brewer *v.* Blougher, 14 Pet., 178.

Again, the intent is not to be ascertained from any particular expression, but from a general view of the whole act.

Per Best, *C. J.*, in 4 Bing., 196.

So, also, the latter part of a statute must prevail against a former part as to any repugnancy.

Potter's Dwarris, p. 156, and note 4.

It is respectfully insisted that under these rules the statute of March 30th, 1868, cannot be held to apply to officers on the retired list.

That statute provides that "any officer of the army who accepts or holds any appointment in the diplomatic or consular service of the Government, shall be considered as having resigned his place in the army, and it shall be filled as a vacancy."

Examining this statute with a view to ascertaining the intent of the law-maker, the question arises what purpose or object was to be gained in prohibiting retired officers from accepting diplomatic or consular positions?

It might well be urged that active officers should not be

allowed to go beyond the limits of their own country or out of the jurisdiction of their military chief. They are subject to call at all times, and are in the active military service of the Government.

It requires no argument to convince us of the propriety of such a regulation.

But as to retired officers, the case is vastly different. They *have* performed the services required of them, and are placed upon the retired list not for what they *may* or *can* do, but for what *they have done.*

They are in the nature of pensioners, and *their pay is in the nature of a pension.*

By section 1243, *et seq.*, of the Revised Statutes, it is provided in what cases an officer may be placed on the retired list.

They are: (*a.*) where he has served a number of years; (*b.*) for disability.

These causes of retirement clearly sustain the position contended for—that the retired officer is in the nature of a pensioner.

What objection can be urged against a person's acceptance of a position in the consular or diplomatic service because he has by age or disability earned a pension from the Government?

Or why should that pension cease because he accepts such a position?

The pay of the active officer is supposed to be for what he does in the line of his duty.

If he leaves the country to enter diplomatic or consular service, there is no reason why he should continue to receive pay for what he does not do, or compel his junior officer to perform his duties.

The retired officer, on the other hand, receives his pay for what he has done, and the same argument does not, therefore, apply.

It cannot be argued that the words "any officer of the army" apply to the retired list, from the fact that in section 1094 of the Revised Statutes the "retired list" is

made a part of the army, for the reason that at the time of the passage of the Act of March 30, 1868 (now sec. 1223 of the Rev. Stat.), the "retired list" was not a part of the army. It was made a part of the army by the Revised Statutes in 1874.

Chapter 1 of Title XIV., embracing the sections from 1094 to 1242, including the section in question, relates *exclusively* to the organization and government of the *active* army, and, so far as officers are concerned, the provisions of his chapter all point to officers on the *active* list.

Chapter 2 of Article XIV., embracing sections 1243 to 1260, relates *exclusively* to the retired list.

Unless sec. 1223 be deemed an exception, and we insist it is not, there is no section in chapter 1 of Article XIV., which comprises all the Revised Statutes relating to the organization of the army—148 sections, containing any rule or regulation for the government of the retired list. This plainly shows that it was not the intention of Congress, in section 1224, to legislate respecting the retired list.

The mischief to be prevented by the provisions of sec. 1223, obviously points to the active list alone. Officers on the active list, if relieved of their commands, and sent abroad to diplomatic or consular posts, will be separated from their proper duties for years, to the serious prejudice of the military service. Surely it was never supposed that any mischief whatever could arise from the appointment to a civil office, of an officer who had been *retired*.

It is the practice of the War Department to announce officially to every officer who is retired, that he is at liberty to engage in any pursuit or employment whatever, subject only to the requirement that he shall report his address monthly to the Department, and that he shall not go beyond sea without leave.

The language of sec. 1223 plainly indicates that it was intended to apply only to the *active* list. The term "officer

of the army" is used to describe an officer on duty in the army—an officer in commission—an officer subject to orders. The retired list embraces only those whose commissions are vacated—who have no duty to perform—who are out of service. It is true they are borne on the retired list in the Army Register as holding a certain *rank* in the army, but they hold no *office*, and therefore are not *officers*, in any legal sense of the word.

An "officer" is one who holds an office. Office is signified by a commission or letter of appointment. "Office" presupposes duties, authority, functions. Nothing of this sort can be predicated of an officer of the army who has been retired. Every attribute of an "officer," except rank, is taken from him in the act of placing him on the retired list. He is out of office, without authority, or duties, or functions to perform.

There is a "retired list" of Judges of the Supreme Court. In any act of Congress relating to that Court, or Judges of the Court, would it be understood that Congress was legislating with reference to the *retired* Judges, unless they were expressly included by the language of the act?

The words "any officer" must therefore be held to mean "any active officer."

That this was the intention of the Legislature is more clearly apparent from the words used later on in the section, "he shall be considered as having resigned his place in the army, and *it shall be filled as a vacancy.*"

Sections 1243 to 1260 of the Revised Statutes apply to retired officers and also to the retirement of active officers.

Section 1255 provides "officers retired from actice ser-
"vice shall be withdrawn from command and from the
"line of promotion."

Section 1257 provides "when any officer in the line of promotion is retired from active service, the next officer in

rank shall be promoted to his place, &c., and the same rule of promotion shall be applied successively to the vacancies consequent upon such retirement."

It will be seen from these sections that when an active officer is retired a "*vacancy*" is created, and provision is made how such vacancy shall be filled.

The death, resignation or dismissal of a retired officer however, creates no *vacancy*, because he is by his retirement *withdrawn from command and from the line of promotion*."

How then, can the place of the retired officer "be filled as a vacancy," since none is created by his resignation.

Is it not, therefore, clear that the words "any officer" in the first part of the section must be modified and limited by the subsequent words, providing for the filling of his place as a vacancy, and be held to refer only to officers on the active list whose resignation would create a vacancy, otherwise the two parts of the statute are repugnant.

Again the Legislature have frequently used the word "army" in the statute, without intending to refer to any but active officers. Sections 1204 to 1209 clearly only refer to active officers, although providing so in terms.

No argument against the construction contended for, can be based upon the arrangement of sections 1222 and 1223 of the Revised Statute, because section 1222 which expressly uses the words "active list," was not enacted until July 15, 1870, nearly two years after the passage and approval of section 1223.

The statute under consideration is in the nature of a penal statute and imposes upon the officer a *forfeiture*.

It should therefore be strictly construed, and no implications should be favored for the purpose of enforcing the forfeiture.

The rule is that the general words shall be restrained

for the benefit of him against whom the penalty is inflicted.

Andrews *v.* U. S., 2 Story, 203.
Strinson *v.* Pond, 2 Curt., 502.
Chase *v.* N. Y. Cent. R. R., 26 N. Y., 523.

It has been said that "Judges where clauses are obscure will lean against forfeitures, leaving it to the Legislature to correct the evil if there be any."

Potter's Dwarris, p. 251.

See, also, in United States *v.* Moore, 3 Story, at page 91, the Court says: "Where words are loose or obscure and admit of two interpretations, the construction ought to be favorable to the claims of the officer."

In the case last cited Congress had passed a law authorizing the appointment of deputy collectors, and provided that such a deputy at certain ports should not receive more than one thousand dollars for any service he might perform for the United States in *any* office or capacity.

The defendant was a deputy collector and also an inspector, and in addition to the pay of the former office, had also received pay for his services as such inspector.

The question as stated by the Court was whether the limitation (contained in the statute) of the compensation of the deputy to one thousand dollars applied to a case where he also held the separate office of inspector and performed all the duties of both offices.

The Court in construing the words "in *any* office or capacity" limited them by holding them to mean "in any *such* office or capacity," thus giving it a liberal construction, and most favorable to the officer.

See, also, United States *v.* Collier, 3 Bl., C. C. R., at p. 333.

In the case at bar, this Court should therefore so construe the Act of March 30, 1868, as not to inflict the forfeiture upon officers on the retired list, such officers not

being within the intent or spirit of the act, and clearly not within its letter, if the words "any officer" are to be construed with reference to the words in the latter part of the section, "and it (his place) shall be filled as a vacancy.

The construction should be such that both provisions, if possible, may stand (U. S. *v.* Moore, 95 U. S., 767).

Still further applying the principles of construction to this Act of 1868, we find the strongest possible argument in favor of the view contended for in the contemporaneous construction of those who were called upon to act under the law and carry its provisions into effect.

In the construction of a doubtful or ambiguous law, the practical construction given to it by those charged with the duty of executing it, is not only of the most forcible character, but in many cases is regarded as conclusive.

Brown *v.* U. S., 113 U. S., 568.
Edwards' Lessees *v.* Darby's, 12 Wheat., 206.
U. S. *v.* Pugh, 99 U. S., 265.
U. S. *v.* Moore, 95 U. S., 760.
U. S. *v.* Alexander, 12 Wall., 180.
Hahn *v.* U. S., 107 U. S., 402.
U. S. *v.* Graham, 110 U. S., 219.
Stuart *v.* Laird, 1 Cr., 299.
U. S. *v.* State Bank of North Carolina, 6 Pet., at. p. 39.
Union Ins. Co. *v.* Hoge, 21 How., at p. 66.
Robertson *v.* Downing, 127 U. S., 607.

The various Attorney-Generals of the United States have frequently so held when applied to for official opinions as to the construction to be given to statutes.

Atty-Gen'l Bates in 10 Op., 52.
Atty-Gen'l Taney in 20 Op., 557.

How have those charged with executing and carrying into effect the Act of March 30, 1868, construed it?

We have the most positive and emphatic construction by them to the effect contended for.

FIRST.—The President, who *is part of the law-making power*, and *is also the head of the army*, and who is the person charged by this very act with the duty of carrying it into effect, has interpreted the act to refer only to the active list.

The same President (Grant), who approved the law, appointed the plaintiff on May 19th, 1869, to the position of Assistant Secretary of Legation at London (Record, folio. 14).

By order of the same President, December 23d, 1869, he was assigned to duty in the City of Washington, "as an officer of the army" (Record, folio 18).

He was ordered by the same President to report to a Board of Officers of the army as to the character of his wounds (Record, folio 17).

Here we have the most conclusive interpretation of the Act of March 30th, 1868.

If it had been construed by the President as applying to the retired list, he would not have assigned Capt. Badeau to duty as an army officer in December, 1869, and would not have recognized him as such officer after his acceptance of the appointment as Assistant Secretary of Legation at London.

Unless the statute in question shall be held by this Court to be so clear and unambiguous in its language as to admit of no doubt as to its meaning, this practical construction by the President would seem to settle the question.

See cases cited, *supra*.

In addition to the foregoing interpretation of the statute, we have the acts of the War Department, which is

specially charged with the execution of all laws relating to the army.

It continued his name upon the Army Register down to 1878, when it was dropped for a short time, after the passage of the Act of March 3d, 1875, because the Department was ignorant of the fact that he was disabled within the intent of that act, and upon being furnished with evidence of that fact, it promptly restored his name to the retired list, and has retained it upon such list down to the present time (Record, folios 19 and 22), and required reports from him monthly.

See also Army Register;
and also sec. 107, p. 18, U. S. Army Regulations.

It paid him as an officer of the army from December 6, 1869, to February 21, 1870 (Record, folio 18), and also from February 21, 1870, to April 30, 1870.

Its action in regard to the dropping of his name from the "retired list," and its subsequent restoration, recognized him as an officer of the army (Record, fols. 19 to 23).

The Treasury Department, another branch of the Government, by approving and passing his accounts as an officer of the army, recognized him as upon the "retired list."

No question appears to have been raised as to his status as an army officer until he presented his claim for payment as such officer while holding another position.

Here then, we have the contemporaneous and uniform acts of the President, the War Department and the Treasury Department, all interpreting the act in question as not applying to retired officers.

It is respectfully submitted that this Court will respect that interpretation, and consider it not only of great

weight, but as controlling in construing the statute in question.

See cases cited *supra*.

Again, the retired list being official and published pursuant to law, the Court will take notice of the fact that Maj. Gen. D. E. Sickles has been continued on it since 1869, although he also accepted the position of Minister to Spain.

Second.

Even if it be admitted, for the sake of argument, that the Act of March 30, 1868, applied to officers upon the retired list, the further question still remains as to the construction to be given to the words "he shall be considered as having resigned his place in the army."

When Congress passed the Act of July 15, 1870, in regard to officers on the active list holding any civil office, it said: "*He shall thereby cease to be an officer of the army, and his commission shall be thereby vacated.*"

Under the statute there could be no question as to the status of an active officer holding a civil office.

His commission was vacated and he ceasd to be an officer of the army. Not so, however, with the section under discussion, "*he shall be considered as having resigned his place in the army.*"

Did Congress intend to place the Government in the position of being able to deprive a retired officer who accepted a diplomatic or consular appointment, of his commission, by *accepting his resignation?*

The Court should not, as already shown, in construing

a penal statute of this kind, extend the language beyond its ordinary and plain meaning.

How and in what manner does a resignation take effect?

Was it necessary for the President or any other officer of the Government to accept this resignation?

Did the Legislature intend to make a difference between such a resignation and one tendered by an officer in the ordinary manner?

If not, then it is clear that some formal act was necessary on the part of the Government to make the resignation effective.

It is well settled that a resignation does not become operative until the officer is officially notified of its acceptance, and that mere acceptance without notice does not give effect to the resignation.

Smith *v.* U. S., 2 Court Cl., 207.
Barger *v.* U. S., 6 Court Cl., 57.
Mimmack's Case, 7 Otto, p. 426.

It may well be urged that the President and the difierent departments of the Government charged with the execution of this law, so construed the Act of 1868, as to vest in the President the right to withhold his acceptance of the resignation of General Badeau and continue him as an officer of the army.

From 1869 down to the present time, there certainly has been no action on the part of the Government which could be construed into an acceptance of this resignation, but, on the contrary, there has been an uninterrupted succession of acts tending to recognize him as an army officer, and he has been treated as such by the President, the War Department and the Treasury Department.

Third.

Without regard to the construction to be given to the Act of March 30, 1868, however, it is respectfully submitted that the Act of March 3, 1875, effectually disposes of the questions at issue in this cause and establishes the status of the plaintiff, Adam Badeau, upon the retired list of the Army.

That act provided "that every officer now borne upon the retired list who has lost an arm or leg, or has an arm or leg permanently disabled by reason of resection on account of wounds, shall be continued thereon, notwithstanding the provisions of sec. 2, chap. 38, Act of March 30, 1868, and all acts or parts of acts inconsistent herewith be and are hereby repealed."

(18 Statutes, p. 512, ch. 178.)

This statute is a remedial one and should be liberally construed so as most effectually to meet the end in view.

Potter's Dwarris, p. 231.
Bechtel *v.* U. S., 101 U. S., 597.
Whitney *v.* Enmet, 1 Baldw., 303.
Whittemore *v.* Cutter, 1 Gall., 429.
U. S. *v.* Burchard, 125 U. S., 179.

At the time of the passage of this act the plaintiff's name was "*borne upon the retired list*" and he came within the disability provided in the section.

It is sought, however, on the part of the Government to deprive him of the benefit of that act by the contention that the law only referred to those *lawfully* on the retired list, and that as he had ceased to be an army officer by his acceptance of a diplomatic position, the Act of 1875 could not restore him to the army, and that the only manner in which he could be restored to his position as an army offi-

cer was by nomination by the President and confirmation by the Senate.

That this argument is not sound will appear by a careful examination of the law in question and the circumstances of the case.

Irrespective of the construction to be given to the Act of 1868, we have the fact that the plaintiff, Adam Badeau, at the time of the passage and approval of the Act of March 3, 1875, was "*borne* upon the retired list;" that he had been recognized as an army officer by the President and the War Department continuously since his retirement and after his acceptance of his diplomatic position, and at no time had he been considered as coming within the purview of that act or affected in his status by its provisions. Even if by his acceptance of the office of assistant secretary of legation he subjected himself to forfeiture at the will of the Government, that forfeiture had not been enforced up to the date of the passage of the Act of 1875, which virtually repealed the law creating the forfeiture.

We have the additional fact that the retired list which is contained in the *Army Register* is an official list published and maintained under provisions of law.

See Resolution of Senate, Dec. 13, 1815.
" " " House, Feb. 1, 1830.
" " " " Aug. 30, 1842.
Act of Congress approved June 18, 1878.
Sections 1226 and 1256 Rev. Stat.

At the time of the passage of the Act of March 3, 1875, *Congress had official knowledge of the names of all officers borne on the retired list.*

Each member of Congress had a copy of such list (see resolutions above referred to and printed on first page of *Army Register*).

Sec. 1256 of the Rev. Stat. provided that retired officers shall continue to be borne on the *Army Register*, &c.

When Congress therefore used the language contained

in the Act of March 3, 1875, "*all officers now borne on the retired list*," it was the same as if it had named each officer.

It had the list before it—an official document, and it must be presumed to have known just what names were contained thereon.

Bound by the knowledge which the legal and official character of the retired list impressed upon it, Congress provided that all officers now borne thereon should be continued, &c.

The language of this enactment is plain and certain. There is no ambiguity in it.

Upon what theory can the Court impart into the statute words not contained therein, for the purpose of limiting its provisions?

If words are to be added, they should rather be for the purpose of broadening and extending its application.

Courts are not at liberty, where the words are general, to insert limitations not called for by the sense or the objects or the mischief of the enactment.

United States *v.* Coombs, 12 Pet., 80.

So, also, in United States *v.* Moore, *supra*, where words are loose and admit of two interpretations, the construction ought to be favorable to the officer.

In Lessee of French, &c., *v.* Spencer, 21 How., 228, it is held that where the Legislature makes a plain provision, without making any exception, the courts can make none.

A plain provision of a statute cannot be construed so as to exclude a particular case from its operation upon a surmise or conjecture, however probable that the Legislature did not actually contemplate or consciously intend its application thereto.

Farmers' Loan & Trust Co. *v.* Oregon, &c., R. R. Co, 24 Fed. R., 407.

6 McLean, 112.

"Every day," said Patterson, *J.*, in King *v.* Burrell, 12 A. & E., 468, "I see the necessity of not imparting into statutes words which are not found there."

And in Everett *v.* Wells (2 Scott, N. R., 531), Tindal, *C. J.*, said: "It is the duty of all courts to confine themselves to the words of the Legislature; *nothing adding thereto;* nothing diminishing."

Looking again at the intent of the Legislature in enacting this provision, is it not reasonable to suppose that Congress, with knowledge of the interpretation given to the Act of March 30, 1868, by those charged with its execution, and with knowledge of the condition of the retired list and the names thereon, passed the Act of March 3, 1875, to meet this very case, and change the law of 1868, as construed by the President, with certain exceptions therein named.

This was the view taken by the Court of Claims upon the first hearing of this cause. (See Opinion, p. 13, Record.)

Can this Court presume that Congress intended to divide the retired list into two parts, and withhold the benefits of that act from one part? The Court of Claims thought differently. (See its Opinion, p. 13, Record.)

In order to maintain its contention that the plaintiff is not affected by this Act of 1875, the Government is driven to the position, that although his name was on the retired list, it was not there lawfully, and he was out of the army at the time.

It would seem to be sufficient in answer to this, to say that his name was on the list, and that Congress *was very particular* to make the law apply to every one "*then borne on the list.*"

Is not the Government now estopped from claiming that plaintiff is not lawfully on the retired list?

An estoppel can be urged against the Government.

U. S. *v.* Collier, 3 Bl. C. C. R., 325.

The further contention of defendant that the Act of 1868 operated *ipso facto* to remove the plaintiff from his place as a retired officer, and that being out of the army nothing short of a new and formal nomination by the President and confirmation by the Senate could restore him to office, is not sound.

The legislation of Congress for many years, as shown in the able opinion of Richardson, *J.*, in Collins *v.* United States (14 Ct. Cl. R., p. 571), recognizes a distinction in the method of appointment of officers on the active and retired lists.

In the case of active officers it requires the nomination by the President, by and with the advice and consent of the Senate (see pp. 572 and 573).

In the case of retired officers, however, it has by a long course of legislation authorized not only the President, but also the War Department to place officers on the retired list (see *id.*, p. 572).

By an act of February 19, 1879, chap. 91 (20 Stat. L., 316), the Secretary of War was authorized to place Francis O. Wyse on the list of retired officers.

An act of 1877, March 3, chap. 133 (19 Stat. L., 48), authorized the *proper authorities* to place a name on the retired list.

An act of March 3, 1877, chap. 134 (Stat. L., 408), enacted that Thos. E. Maley *is hereby restored* upon the list of retired officers.

What practical difference is there between the act in question, which provides that *every officer now borne upon the retired list shall be continued thereon, &c*, and the acts above referred to?

Is it not the same as if *Congress had specially named those officers then on the retired list?* Must not all the names on the retired list be considered as included in the act?

The same case, Collins *v.* United States, disposes of the question raised by defendant as to the unconstitutionality of such an appointment.

It discusses the provision of the Constitution (pp. 574 and 575), and holds that the latter part of sec. 2 of art. 2, which provides "that Congress may by law vest the appointment of such inferior officers as they think proper "in the President alone, in the courts of law, or in the "heads of departments," authorizes Congress to pass such acts as those above referred to, vesting either in the President or the heads of departments the power to place the names of officers on the retired list.

It will not be seriously contended that Congress has not ample power over the retired list. This power has so long and so often been exercised, that it may be considered as established.

In *U. S.* vs. *Wood*, 107 *U. S.*, 414, the Court says, "*The rank and pay of retired officers are matters entirely* within the control of Congress."

It is respectfully insisted that the Act of March 3, 1875, authorized the President or the War Department, or both, to "*continue*" on the retired list the name of Adam Badeau, with the same force and effect as if he had been specially named therein.

See also Moore's case, 95 U. S., 760, as to validity of appointment without advice and consent of Senate.

Again, it has been held by the Court of Claims in Smith *v.* U. S. (2 Ct. Cl., 206) that the President alone can restore an officer to the army where his dismissal was made without cause and by mistake.

If the Court should hold, however, that Captain Badeau, being out of the army, could not be restored except by nomination by the President and approval by the Senate, it is suggested that there exists both in this case.

The Senate approved the Act of March 3, 1875, which must be held to have specially named Captain Badeau, as

it referred to the retired list upon which was his name, and the President formally approved the act.

Again, by section 1228 of the Revised Statutes, it is provided that "No officer of the army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service except by a reappointment confirmed by the Senate."

This provision was held in Collins *v.* U. S. (*supra*) to be a clear recognition by Congress that the restoration of dismissed army officers is authorized and effected in some cases, if not usually, without confirmation by the Senate.

It is the only provision in the statutes which provides for a reappointment confirmed by the Senate, and is further limited to cases of dismissal by court-martial.

Must not the maxim apply: *Expressio unis est exclusio alterius.*

Collins *v.* U. S. (*supra*).

Must it not therefore be held that the Act of 1875 authorized the President to retain and continue on the retired list all officers coming within the class described in that act, and when the President so retains such an officer, having previously approved the act itself, is not that retention of the officer valid and does he not continue to be an officer of the army upon the retired list by virtue of the joint action of Congress and the President?

Again, if there was a forfeiture provided by the Act of 1868, since the Government never enforced it, but on the contrary expressly waived it until 1875, and the Act of 1875 repealed the forfeiture as to plaintiff, must not the Court now hold that as to the plaintiff the Act of 1868 is as if it never existed?

Lord Tenterden, *C. J.*, in Surtees *v.* Ellison, 9 B. & C., 752.

In State of Maryland *v.* B. & O. R. R. Co., 3 How., 534 (see p. 552), it is held that the Legislature may remit a forfeiture, and that the repeal of the law imposing it is of itself a remission.

It may be urged by the defendant that the Act of March 3, 1875, cannot operate retroactively, but it being a remedial act, it will be allowed so to operate if the intention so to do appears therein.

In re Billing. 3 Ben., 214.

The opinion of the Attorney-General (Vol. 15, Op., 407) will be cited by the defendant's counsel, as against the construction of the Act of 1868 contended for, but in answer thereto, it is respectfully submitted, that while the opinion in question construes the Act of 1868 as applying to retired officers, it at the same time expressly recognizes as sound the principle that if the plaintiff came within the disability provided in the act, he would be properly continued on the retired list. And the opinion proceeds on the theory that he did not belong to that class of retired officers described in the first proviso of sec. 2 of the Act of March 3d, 1875.

Counsel has not argued upon the effect of the unwarranted dropping of Captain Badeau's name from the Army Register, and its restoration some months later.

It is clear that this action does not in any way affect his status as an army officer or the questions involved in this suit.

The case of Smith *v.* U. S. (*supra*) is conclusive upon the effect to be given to an unauthorized dismissal of an officer or dismissal by mistake. Its revocation operates from its inception, and all its consequences are annulled.

See also Winters *v.* U. S., 3 N. & H., 136, and case cited in opinion of Nott, *J.*, p. 13, Record.

If the plaintiff is properly on the retired list there can

be no question in regard to his right to pay as a retired officer while holding a diplomatic or consular position.

12 Op. Atty.-Gen., 459.

Converse *v.* U. S., 21 How., 463.

Fourth.

Counsel therefore submits:

1st. That the Act of 1868 did not apply to the retired list, and the acceptance of the position of Assistant Secretary of Legation at London by the plaintiff did not affect his rank as a retired officer.

2nd. That even if it did affect in any way plaintiff's rank on the retired list, the Act of March 3, 1875, validated any defects in his title and continued him thereafter on the retired list, giving him all the rights incident thereto.

3rd. That the plaintiff is therefore entitled to his pay as a retired officer for the periods claimed.

DANL. P. HAYS,
Of Counsel for Plaintiff and
Appellant, Adam Badeau.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

ADAM BADEAU, APPELLANT,
vs.
THE UNITED STATES. } No. 659.

THE UNITED STATES, APPELLANT,
vs.
ADAM BADEAU. } No. 749.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

ADAM BADEAU, APPELLANT, *vs.* THE UNITED STATES. } No. 659.

THE UNITED STATES *vs.* ADAM BADEAU. } No. 749.

APPEALS FROM THE COURT OF CLAIMS.

STATEMENT AND BRIEF OF ARGUMENT FOR THE UNITED STATES.

Judgment dismissing the petition of Adam Badeau, No. 13855, Court of Claims, was rendered by that court on the 9th day of May, 1887.

The petitioner claimed the pay of a captain United States Army, mounted, retired from active service from April 28, 1870, to September 16, 1871, and from Novem-

ber 25, 1882, up to the time of filing petition (February 19, 1884), amounting to the sum of $18,852.65.

A counter claim was made in behalf of the Government, that at the time of the commencement of this suit Adam Badeau was indebted in the sum of $2,560.10 for money erroneously paid him at intervals without authority of law, the same being on account of salary as an army officer (captain retired) from December 31, 1869, to October 31, 1882, during all of which time it was alleged said Badeau was not, in fact, in the Army or an officer thereof.

The counter claim was not allowed by the court below, whereupon an appeal was taken on behalf of the Government to this court.

The facts of the case, as found by the court below, are substantially as follows:

On the 21st of April, 1869, Adam Badeau, then a first lieutenant of infantry in the United States Army, unassigned, was appointed by the President assistant secretary of legation at London. On the 19th of May, 1869, he accepted the appointment, filed in the Department of State his oath of office, and embarked for his post, reaching England May 31, 1869.

One day before the acceptance of his appointment, to wit, on the 18th of May, 1869, he was found by a board of officers, convened by direction of the President, incapacitated for active service, and "that said incapacity is due to a wound received in the foot whilst on duty as captain and additional aid-de-camp to Maj. Gen. T. W. Sherman, in the assault on Port Hudson in May, 1863." On the

22d of May, 1869, this finding was approved by the Secretary of War.

On the 25th of May, 1869, General Badeau, by direction of the President, was retired with full rank of captain, to date from May 18, 1869. Claimant held the office of assistant secretary of legation and received the full salary thereof until December 6, 1869.

He was on the 23d December, 1869, assigned to duty in the city of Washington, to date from December 6, as an officer of the Army. He drew from the Pay Department in the Army the pay of an "active captain" from December 6, 1869, to February 21, 1870, and the pay of a "retired captain" from February 21, 1870, to April 30, 1870. He was appointed consul-general at London, England, April 28, 1870, and was in the consular service until the commencement of this suit, except for a period of about fourteen months, beginning in September, 1881, and ending in November, 1882.

From the 21st February, 1870, to 31st October, 1882, he was paid as a captain in active service, $396.92.

From 21st February, 1870, to 31st October, 1882, he was paid as a retired officer for periods when he was not holding a diplomatic or consular office $2,163.18. Total, $2,560.10.

In conformity with section 1223, Revised Statutes, and opinion of Attorney-General dated December 11, 1877, on the 7th of May, 1878, he was "dropped" from the retired list, to date from May 19, 1869.

July 3, 1878, Badeau having applied to have the order

dropping him from the retired list revoked, on the ground that he was disabled within the intent of the act of 3d March, 1875, and having produced evidence of the nature of his wound and the surgical operation performed, he was for the reasons presented, restored to the retired list.

His claim is for pay as a retired officer for the whole period from May 18, 1869, to the time of the institution of this suit, except for such period as he received pay for active service or on the retired list as above stated.

It was argued in behalf of the Government in the court below that under the provisions of section 3 of the act of March 30, 1868, entitled "An act making appropriations for consular and diplomatic expenses, and for other purposes" (15 Stat. L., 58), Adam Badeau's connection with the Army was severed from the 19th day of May, 1869, when he accepted the position of assistant secretary of legation to London. The section of the act referred to is as follows:

> Any officer of the Army or Navy of the United States who shall, after the passage of this act, accept or hold any appointment in the diplomatic or consular service of the Government shall be considered as having resigned his said office, and the place held by him in the military service shall be deemed and taken to be vacant, and shall be filled in the same manner as if said officer had resigned the same.

It was further urged that, Badeau being out of the Army, subsequent payments to him as a captain for active

service and on the retired list, amounting to $2,560.10, were unauthorized, and that a judgment for that amount should be rendered against him.

In reply it was urged by claimant—

(1) That the act of March 30, 1868, does not apply to officers of the Army on the retired list.

(2) Even if the said act of March 30, 1868, applied to officers upon the retired list, he did not lose his place in the Army by accepting the appointment of assistant secretary of legation to London or by accepting the position of consul-general at London, as there was no formal acceptance of his resignation.

(3) Without regard to the construction of said act of March 30, 1868, by virtue of the act of March 3, 1875, the status of claimant is established as upon the retired list of the Army.

The act of March 3, 1875, referred to, is as follows:

> SEC. 2. That all officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an

arm or leg, or has an arm or leg permanently disabled by reason of resection, on account of wounds, or both eyes by reason of wounds received in battle; and every such officer now borne on the retired list shall be continued thereon, notwithstanding the provisions of section two, chapter thirty-eight, act of March thirty, eighteen hundred and sixty-eight: *And be it also provided*, That no retired officer shall be affected by this act who has been retired or may hereafter be retired on the rank held by him at the time of his retirement, and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed. Approved, March 3, 1875. (18 Stat., p. 512, ch. 178.)

ASSIGNMENTS OF ERROR.

The court erred in not rendering a judgment in favor of the United States and against Adam Badeau for the sum of $2,560.10.

ARGUMENT.

I.

Under the provisions of act of March 30, 1868, *supra*, upon the acceptance of Adam Badeau of the position of assistant secretary of legation to London his official connection with the Army was severed.

The act of 1868, *supra*, is direct and comprehensive in its terms.

It includes any officer coming within its provisions.

Any officer who accepts any appointment in the diplomatic or consular service of the Government, or any officer holding either of such positions after the passage of the act, "shall be considered as having resigned said office."

No formal resignation is therefore necessary.

The place "held by him in the military service shall be deemed and taken to be vacant."

No formal acceptance of the resignation by the Government is therefore necessary.

The statute is clear and unambiguous in its terms. Its meaning and intent is clearly expressed in the words used. Rules relating to the construction of statutes, doubtful in meaning or obscure in expression, are not applicable.

If appellant was an officer of the Army at the time he accepted or held a diplomatic position in the service of the Government he is within the plain terms of the act.

He was, as found by the court below, in active service in the Army prior to the 18th day of May, 1869. Upon that day he became a retired officer.

By section 1094 Revised Statutes "The officers of the Army on the retired list" are declared to constitute part of the Army.

They are entitled to wear the uniform, to have their names on Army Register, are subject to the Rules and Articles of War, and to trial by general court-martial for any breach thereof. (1256, Rev. Stat.) They may be assigned to duty. (1258, 1259, Rev. Stat.) The number of retired officers of the Army is limited to 300 or a less number if so fixed by the President. (Rev. Stat., 1258.)

Retired officers of the Navy are continued on Naval Register, are entitled to wear uniform, and are subject to laws and regulations (Rev. Stat., § 1457). They are entitled to promotion (Rev. Stat., 1457). They may be assigned to duty (Rev. Stat., 1462, 1463, 1464). They may be restored to active list (Rev. Stat., 1465). They maintain their relative rank. (Rev. Stat., § 1481, 1482.)

There are numerous other statutes recognizing the official character of both Army and Navy officers retired.

An officer of the Army "retired from active service" is not only in the military service of the United States, but he is also entitled, in addition to the percentum of rank upon which he is retired, to the benefit of the longevity-pay acts, the same to apply to length of service on the retired as well as the active list. (*United States* v. *Tyler*, 105 U. S. R., 244.) The opinion in the Tyler case, *supra*, has been repeatedly affirmed, and the pay of officers of the Army is fixed in accordance therewith, and is so paid by the accounting officers of the Treasury.

Retired officers of both the Army and Navy are, therefore, officers in the broadest and most comprehensive sense.

Even if, as claimed, their pay is in the nature of a pension, it would be immaterial; they are nevertheless officers. But they are not pensioners—they are subject to rules and regulations; they may be court-martialed they may be assigned to active duty; they receive increased

pay for length of service; they maintain relative rank; they may be promoted; they are entitled to wear uniforms.

Nor do the words "and the place held by him in the military service shall be deemed and taken to be vacant, and shall be filled in the same manner as if said officer had resigned the same" limit the meaning of "any officer" in the act, to officers in active service. Vacancies in the grade created by death of all officers in active service do not necessarily create places to be filled. Vacancies in the grade of Admiral and Vice-Admiral in the Navy shall not be filled by promotion (R. S., 1362), nor in the grade of General or Lieutenant-General in the Army (R. S., 1094). Until otherwise directed by law there shall be no promotions in the departments of the Adjutant-General, Inspector-General, or in the Pay, Subsistence, Quartermaster, Ordnance, or Medical Departments in the Army (R. S., 1194). In the Navy the number of officers in different grades are limited (R. S., secs. 1363, 1495, 1376, *et al.*).

On the other hand, vacancies can be filled on the retired list of both the Army and Navy. In the Army the number of officers on the retired list is limited to 300, or a less number if so fixed by the President (R. S., 1258). In the Navy vacancies may be filled by promotions (R. S., 1460, 1461).

In the case of appellant, he was, according to the findings, after retirement, assigned to duty as an officer and paid for active service.

Whatever may be thought of the reasoning of appellant in his brief, he is mistaken in his premises, viz, that the death, resignation, or dismissal of a retired officer creates no vacancy, because he is by his retirement withdrawn from command and line of promotion.

The clause of the act referred to simply means if the place vacated can, when vacant, be filled, it shall be filled in the same manner as if said officer had resigned the same.

Where Congress limits the provisions of statute to a single class of officers, the intent is expressed in the law itself. In the act of 1868 it was intended by Congress to declare a diplomatic and consular service incompatible with military service of an officer either on the active or retired list. In 1870 Congress declared that no officer of the Army *on the active list* shall hold any civil appointment, and by the acceptance or exercising the functions of such office he shall cease to be an officer of the Army. The provisions both of the laws of 1868 and 1870 were incorporated in the Revised Statutes, sections 1222 and 1228.

The law of 1868 is not, as asserted in claimant's brief, in the nature of a penal statute, nor does it impose upon the officer a forfeiture. It assumes an officer resigns his commission before accepting a position in the diplomatic or consular service, on the ground that the two services are not compatible with each other, and for the same reason it assumes that such resignation is without formality accepted. The officer commits no offense, penal or other-

wise, by accepting or holding such position. He forfeits nothing; he voluntarily resigns his position in the Army.

If the statute were regarded as penal, and the severance of his connection with the Army a forfeiture, the question of construction does not arise, as urged by claimant. The law is clear and unambiguous.

The construction of the act of 1868, urged in behalf of the Government, is in accord with the opinion of the Attorney-General, who, in a letter dated December 11, 1877 (15 Ops. Atty. Gen., 407), to the Secretary of War, says:

> I am unavoidably brought to the conclusion that Captain Badeau has ceased to be a retired officer of the Army by the effect of the statutory provision embodied in section 1223, above cited, and I have the honor to state that in my opinion his name can not therefore be legally continued on the retired list.

It is not in dispute in this case that Adam Badeau was a retired officer in the Army on the 18th day of May, 1869. He accepted subsequently, and within a short time, the position of assistant secretary of legation to London.

If an officer retired, is (as he is regarded in many statutes, in many opinions of this court, in repeated decisions of the Court of Claims, by the uniform action as to pay by the accounting officers of the Treasury), an officer of the Army, then Adam Badeau was immediately upon his acceptance of the appointment in the diplomatic service included within the provisions of the act of 1868, *supra*.

If so included, his connection with the Army was severed. He was again in civil life, holding a position under the Government to which an officer in the military service of the Government is ineligible.

II.

If appellant was out of the Army on the 19th of May, 1869, by his own voluntary act he could not afterwards be re-instated by order of the President.

He could not re-enter the Army except in the manner prescribed by section 2 of article 2 of the Constitution.

Where there is a valid resignation and an unconditional acceptance of it, the concurrence of which operated to remove the incumbent from his office in the military service, or where for any reason he actually loses his position, nothing short of a new appointment by the President, confirmed by the Senate, can have the effect of restoring him to that office.

(Opinion Atty. Gen'l Evarts 12 Ops., 555; *Mimmack's case* (97 U. S R., 426); *Dubarry's Case* (4 Ops. Atty. Gen'l, 603); *Bennett's Case* (19 C. Cls., 379); *McElrath's Case* (12 C. Cls., 584, 102 U. S. 12, 426); *Miller's Case* (19 C. Cls., 338); *Badeau's Case* (15 Ops. Atty. Gen'l, 407); *Blake's Case* (14 C. Cls., 462; 103 U. S. R., 227); *Montgomery's Case* (19 C. Cls., 370); *Bennett's Case* (19 C. Cls., 379); *Palen's Case* (19 C. Cls., 389); *McBlair's Case* (19 C. Cls., 528); *Vanderslice's Case* (19 C. Cls., 480).

There was no necessity for a formal resignation or a formal acceptance of such resignation in the case at bar.

On the 19th of May, 1869, Adam Badeau accepted and afterwards held the position of assistant secretary of legation to London. April 28, 1870, he was appointed and afterward held the position of consul-general at London.

Under the provisions of the act of 1868 the acceptance or holding an appointment either in the diplomatic or consular service was equivalent to a resignation. Badeau accepted and held both. By such acceptance and holding, the place held by him in the military service was by the express terms of the statute vacant.

III

The mere fact that Badeau's name was printed in the Army Register as a retired officer does not include him in the list of "every such officer now borne upon the retired list" within the provisions of act of March 3, 1868.

The act of 3d of March, 1875 *supra*, applies to *officers* borne on the retired list. At the time of the passage of said act, Adam Badeau was not an officer. He had by the terms of the act of 1868 *supra*, resigned, and his place was vacated.

"Borne on the list" refers to those retired officers lawfully on the list.

It is not denied that the Army Register should contain an official list of officers of the Army, but it is claimed that the mere printing of a name on such list of a person, not an officer would not make the person so named an "officer of the Army."

The claimant in this case is not included within the provisions of sections 1226 and 1256, Revised Statutes,

cited in his behalf. Section 1226 (28th July, 1866) refers to officers who are entitled to have their names printed in the Army Register. Section 1256 (3d August, 1861) refers to retired officers. It surely could not apply to Badeau when in the diplomatic or consular service. He certainly was not in such position entitled to wear the army uniform; nor was he subject to the Rules and Articles of War, nor to be tried by general court-martial for any breach thereof.

If it be true that an officer who is wholly out of the Army, by resignation or otherwise, can not be re-instated by order of the President, or in any manner except in accordance with the provisions of section 2 of article 2 of the Constitution, it follows that an authorized recognition or order of the President will no more re-instate a former officer of the Army than it would a person never in the service.

In many instances Congress has assumed the power, in individual cases, to authorize the President to reappoint officers who have been mustered out of the Army. This has generally been done either to place them on the retired list or on the active list for the purpose of retirement. A large number of such cases are referred to in the opinion of Chief Justice Richardson in *Collins's Case* (14 C. Cls., 571, *et seq.*).

The constitutionality of such appointments may be sustained on two grounds: It may be that the term "inferior officers," in section 2, article 2 of the Constitution, is used in contradistinction to "ambassadors, other public

ministers and consuls, judges of the supreme court." Or, where by special law of Congress, the President is authorized to appoint an individual, the approval of the Senate may be implied by reason of the passage of the act itself, the Senate approving the appointment when the law was passed.

But if the authority conferred by such laws should be held to be in opposition to the Constitution, such laws must yield to the Constitution; not the Constitution to the laws.

In any point of view, Badeau's position in the Army after his resignation and the vacating of his place would have to be regained, either by new appointment made by the President by virtue of his constitutional power, or by virtue of a special law authorizing him to make it.

It is not claimed that a re-appointment was ever made by the President. He was recognized as an officer in manifest opposition to the express terms of the law of 1868, *supra*. To give such recognition was not within the general powers of the President. He was not empowered to give it by any special act.

The act of 1875 was not retroactive; the proviso under which claim is made does not include every officer then or theretofore on the list. It only includes "every such officer now borne on the retired list." As Badeau at the time of the passage of the act was not an officer of the Army, he was not included in the provisions of the act.

The printing of his name on the list after he was out of the Army gave him no rights. The dropping of his name on May 7, 1878, deprived him of none; by its reprinting under the order of July 3, 1878, he acquired none, prospective or retroactive.

IV.

If Adam Badeau was wholly retired in May, 1869, it follows that he is not only not entitled to any pay as an officer of the Army after that date, but that the payment of any moneys received by him as an officer was unauthorized, and a judgment should be rendered against him for such amount.

If Badeau was not in the Army since May 19, 1869, either on the active or retired list, he is not entitled to the pay of an Army officer. The major part of the claim made is therefore without foundation.

The question still remains that, having erroneously received pay, can he be required to return the same?

It was held by the Court of Claims in Collins's case (15 C. Cls., 34) that the President alone, or the President with the advice and consent of the Senate, by antedating a commission without legislative authority could not create a liability on the part of the United States to pay him a salary for the time he was not in service.

In the case of Burchard (19 C. Cls., 137), where an overpayment had been made, a judgment in favor of the Government was rendered for such overpayment.

It was held in Miller's case (19 C. Cls., 339), where one

claiming to be an officer rendered no service, and held no official relation to the Government, money paid him for salary may be recovered back.

In Montgomery's case (19 C. Cls., 370), it was held that claimant must refund the money which he wrongfully drew from the Treasury for services not performed.

(And see *Bennett's Case*, 19 C. Cls., 379; *Palen's Case*, 19 C. Cls., 389; *McElrath's Case*, 102 U. S. R., 426; *Burchard* v. *The United States*, U. S. R., 176; *Runkel's Case*, 19 C. Cls., 396; *Vanderslice's Case*, 19 C. Cls., 480.)

On the 23d of December, 1869, claimant was assigned to duty in the city of Washington as an officer of the Army, it being stated that the order was to date from December 6, 1869.

He drew pay December 6, 1869, to February 1, 1870, $396.92.

The President had no authority to create a liability on the part of the Government, even with the consent of the Senate, by antedating his assignment to duty. Claimant was not on the active list and was not entitled to pay by reason of such assignment by the President.

It is not in evidence that he at any time since his retirement has ever rendered any service in the Army.

It is not pretended that he rendered any military service between 21st of February, 1870, and 31st of October, 1882, yet during which period he was paid as an officer on the retired list, when he was not holding a diplomatic or consular office, the sum of $2,163.18.

Since his retirement in 1869 he has never been an officer of the Army *de facto* or *de jure*.

It is respectfully submitted that judgment should be rendered against Adam Badeau in favor of the United States for the sum of $2,560.10.

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